Supreme Court of the United States

October Term, 1968.

No. 436

PAULETTE BOUDREAUX RODRIGUE, ET AL.,
and
ELLA MAE DUBOIS DORE, INDIVIDUALLY, ETC.,
Petitioners,

versus

AETNA CASUALTY AND SURETY COMPANY, ET AL.,
and
THE LINK BELT COMPANY, ET AL.,
Respondents.

REPLY BRIEF FILED ON BEHALF OF PETITIONERS, PAULETTE BOUDREAUX RODRIGUE, ET AL., AND ELLA MAE DUBOIS DORE, INDIVIDUALLY, ETC.

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MAY IT PLEASE THE COURT:

Respondents, in their brief, contend that because the Death on the High Seas Act is available for recovery of pecuniary losses for death, the state law could not apply. These arguments in respondents' brief are based upon a false assumption which begs the question at issue.

Respondents *assume* that if one vehicle of recovery is available, then no other vehicle of recovery can be available. Under respondents' assumption, if the law were such that a person would be entitled to a remedy under the laws of contract for, say, damage to his personal property, then there could be no law which would concurrently allow him a remedy under tort principles for the same incident. Similarly, under respondents' assumption, if a remedy were possible under a warranty of seaworthiness, then a Jones Act remedy would be impossible, or similarly, if some portion of a redress could be obtained by way of an award for maintenance and cure, then no laws allowing recompense of damages would apply. This assumption is patently false. Because one set of laws does apply does not mean that another set does not also apply.

The same fallacy is present in respondents' contention that because the Death on the High Seas Act is not identical with the State Death Act, the two acts are "inconsistent with" each other. Respondents assume that in the pertinent provision of the Outer Continental Shelf Lands Act, 43 U.S.C. 1333 (a) (2), the word "inconsistent" means "not identical in every detail". According to this assumption, that provision of the Outer Continental Shelf Lands Act which expressly provides that the law of the adjacent state is to be extended would be meaningless, vain and useless because no state law could be extended, i.e., any state law which would not coincide precisely with the federal law already in existence would be "inconsistent" with the federal law.

Obviously the word inconsistent means "in conflict with". To give any effect to the pertinent provision of the Outer Continental Shelf Lands Act, the state law must apply to *supplement* the federal law. Law that supplements federal law is not inconsistent with the federal law simply because its ex[illegible] and provisions are not precisely the same as the federal law—otherwise the state law could not supplement the federal law.

Thus, it is not correct to say that a remedy in tort is inconsistent with a remedy in contract or quasi contract or that a remedy under maintenance and cure is inconsistent with a remedy for damages for the same accident or that unseaworthiness is inconsistent with a Jones Act remedy. On the contrary, the law is clear that plaintiffs may pick and choose among their remedies so long as they can bring themselves within the "terms" of the statute or law upon which they rely. The tort remedy and the contract remedy are not "conflicting" or "inconsistent" with each other simply because they are both available and the measure of damages, right to attorney fees and statute of limitation, etc. are different.

Thus, with the realization that there is nothing prohibitive or unusual in having two routes to arrive at a single destination, the sine qua non upon which is based respondents' argument in connection with which they list the differences in the remedy under state law and the remedy under federal law, is done away with. If a plaintiff can bring himself within the provisions of the state law, i.e., suing within its delay rather than

waiting for a delay under some other law and if the right party[1] brings the suit pursuant to the state action and if there is no contributory negligence, etc., then he will be entitled to his remedy under state law, despite the fact that he may also have a remedy under federal law.

Moreover, as to the remedy for the non pecuniary damages for wrongful death which is the issue here, there is no federal law which the state action can be inconsistent with! Surely and clearly—without any doubt—the state law was, by the Outer Continental Shelf Lands Act, meant to supplement the federal law and at least fill voids. There being no federal remedy (nor any federal prohibition) whatsoever for collecting the *non pecuniary* losses in wrongful death actions, the state law clearly is to supplement the federal law at least as to those losses. Thus, even if, arguendo, respondents' contentions that the Death on the High Seas Act as an exclusive remedy would prevail, it would still not prevent the Outer Continental Shelf Lands Act from supplementing the existing law and allowing a remedy, if al-

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[1] Respondents attempt to make an issue of the contention that in a given case a potential plaintiff, e.g. a surviving non-dependent brother or sister when there is no spouse, descendants or parents, may have a cause of action under the state law but none under the federal law. That such a plaintiff is given a cause of action for such damages as he sustained does no harm! The categories of potential plaintiffs under the Death on the High Seas Act are not the same as under the Jones Act, yet no injustice is done when a plaintiff recovers his damages under the Death on the High Seas Act when he could not have under the Jones Act. See e.g. *The Four Sisters*, 75 F. Supp. 802, 1947 A.M.C. 1623 and see the discussion in Gilmore & Black, *The Law of Admiralty*, 304 (1957).

lowed by the state law of the adjacent state, for the non pecuniary losses.

PRINCIPAL CASES RELIED ON BY RESPONDENTS.

The only two circuit court cases quoted from by respondents in their brief are *Higa v. Transocean Airlines*, 230 F.2d 780 (Ninth Cir. 1955) and *Pure Oil Company v. Snipes*, 293 F.2d 60 (Fifth Cir. 1961). Both of these cases are clearly distinguishable from the instant case and present no true authority for respondents' arguments.

In *Higa vs. Transocean Airlines*, 230 F.2d 780 (1965) cert. den. 352 U.S. 802, a plane on its way to Hawaii crashed in the high seas and caused the death of Higa. Higa had been a citizen of Hawaii. His administrators brought suit seeking recovery under the Death on the High Seas Act and also recovery under the Hawaiian wrongful death statute. The Court took special note that the plane had been owned not by an Hawaiian corporation but by a California corporation. The Court dismissed the action based on the Hawaiian Code because "there is no provision of that Code or decisions of the Hawaiian Courts making it applicable to death on the high seas beyond the territorial waters" 230 F.2d at 781. This language is most favorable to petitioners in the instant cases inasmuch as there is a provision of law, the Outer Continental Shelf Lands Act specifically applying the Louisiana Death Act to the locality where the death occurred and there is a decision, *The E. B. Ward, Jr.*, 17 Fed.

456, applying the Louisiana Death Act to death on the high seas.

In *Higa* the Court ruled that the Death on the High Seas Act did not in any way preempt or disturb or otherwise affect any existing other death remedies. The Court, in that connection, reviewed the legislative history of the Death on the High Seas Act and stated that Section 767 of the Act entitled "Exceptions from operation of this chapter" (which section provides "the provision of any state statute giving or regulating rights of action or remedies for death shall not be affected by this chapter") meant precisely what it said and that the legislator most responsible for the act no doubt had in mind preserving and leaving unaffected those causes of action allowed by the state death act. The Court cited some of the cases already on the books at the time of the passage of the Death on the High Seas Act which had allowed recovery pursuant to state death acts for deaths occurring on the high seas and noted that the legislator no doubt had those cases in mind. Among those cases the Court listed the heretofore referred to Louisiana case, *The E. B. Ward, Jr.*, 17 Fed. 456. The Court ruled:

> "In considering this contention it is of importance that the High Seas Act deprived no state or federal court of a then existing right. As to the state courts 46 U.S.C.A. sec. 767 provides:

Sec. 767. Exceptions from operation of chapter. The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter.

As originally drafted, the bill had an added clause limiting the state to acts in its own waters, reading: 'as to causes of action accruing within the territorial limits of any state'. Representative Mann offered an amendment striking out this clause. Mann gave as his reason for striking out the limiting clause that it was to save state statutes giving jurisdiction in high seas death cases. Some opposed because they wanted the Act to be exclusive. Others agreed to the amendment on the ground that Section 767 as passed would be held invalid on the ground of the constitutional control of Congress discussed above. Congress agreed with Mann who offered the amendment and the limitation was stricken from the bill.

Further, Mann no doubt had in mind some one of the federal cases, holding that the laws of the state controlled the action of persons within ships on the high seas and had construed their death statutes as applying there. Southern Pac. Co. vs. De Valle Da Costa, 1 Cir., 1911, 190 F. 689; International Nav. Co. v. Lindstrom, 2 Cir. 1903, 123 F. 475; The James McGee, S D.N.Y. 1924, 300 F. 93; *The E. B. Ward, Jr.*, C.C.E.D.La. 1883, 17 F. 456. (Emphasis added.)

> Even if Congress had not agreed with the interpretation of the proponent of the amendment, we would hesitate to construe the exceptive clause as depriving the states of the then existing jurisdictions shown as exercised in the above cited cases."

In the *Snipes* case, a workman was injured on one of the platforms in the Outer Continental Shelf. More than one year passed between the time of the injury and the time that Mr. Snipes brought suit. In that case, the defendant contended that Mr. Snipes' exclusive remedy was under the Louisiana Law and that therefore the Statute of Limitations had run against his claim, the Louisiana Statute requiring suit to be brought within one year from the date of the accident. However, the plaintiff countered with the contention that he had a federal remedy for the injury on the platform. The Court upheld the plaintiff's contention that the federal remedy was available. Thus, the holding in the *Snipes* case was only that the state remedy was not exclusive. The *Snipes* case was not involved with the issue of whether either the state or the federal law were exclusive. The issue raised was only whether the state law was the exclusive remedy, and the Court properly held that it was not. The *Snipes* case is therefore certainly not authority for the proposition that the federal law is exclusive.

RESPONDENTS' DISCUSSION OF THE LEGISLATIVE HISTORY OF THE DEATH ON THE HIGH SEAS ACT.

Respondents quoted a portion of the legislative history of the Death on the High Seas Act, quoting excerpts

from the debates and the thoughts of some of the legislators prior to the vote on the amendment which, if passed, would remove (and did remove) that section of the Death on the High Seas Act which provided that the Act would be an exclusive remedy. It is true that during that *prior* debate, *some* of the parties thought that the Death on the High Seas Act should be exclusive. It is also quite true that the Honorable Harrington Putnam who had drafted the bill and who had inserted in it the provision which made it an exclusive remedy thought that it should be an exclusive remedy. However, the brutal fact is that *after* the debate, the amendment which struck the exclusive remedy provisions from the act was passed. As enacted, the act by its plain terms is not an exclusive remedy (See 46 U.S.C. 767). It appears difficult to see how the argument can be made that since before it was amended the act was designed to be an exclusive remedy that it should remain so after it was expressly amended so as to read that the act is not an exclusive remedy.

It is respectfully submitted that the instant cases should be remanded as prayed for in the original brief submitted on behalf of petitioners herein.

Respectfully submitted,

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CERTIFICATE.

This is to certify that I have this day mailed a copy of the above and foregoing Reply Brief Filed on Behalf of Petitioners, Paulette Boudreaux Rodrigue, et al., and Ella Mae Dubois Dore, Individually, etc. to Mr. Richard C. Baldwin, Adams and Reese, 847 National Bank of Commerce Building, New Orleans, Louisiana; Mr. Thomas W. Thorne, Jr., Lemle, Kelleher, Kohlmeyer, Matthews & Schumacher, National Bank of Commerce Building, New Orleans, Louisiana; Mr. Lancelot P. Olinde, Humble Oil & Refining Company, P. O. Box 60626, New Orleans, Louisiana; Mr. H. Lee Leonard, Voorhies, Labbe, Fontenot, Leonard & McGlasson, Lafayette, Louisiana; and Mr. James E. Diaz, Davidson, Meaux, Onebane & Donohoe, 201 West Main Street, Lafayette, Louisiana.

February ...., 1969.

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